IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-706

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
UNITED TRANSPORTATION UNION AND
UNITED TRANSPORTATION UNION, LOCAL 807,
Petitioners,

v.

DUANE TERRELL BURNS, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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v.
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, Southern Pacific Transportation Company, a corporation, United Transportation Union and United Transportation Union, Local 807, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in these proceedings on September 7, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit has not been reported in the Federal Reporter at the time of the filing of this Petition for Certiorari. The opinion is reproduced in the

Appendix at Page 1a. In addition, the Appendix contains the opinion of the United States Court of Appeals for the Ninth Circuit in *Anderson* v. *General Dynamics, et al.*, Case No. 77-2180 (September 7, 1978), which was consolidated for argument on appeal with the instant case and to which reference may be necessary to ascertain the grounds of the opinion in the instant case.

The opinion of the United States Court for the District of Arizona is not reported in Federal Supplement. It is reproduced in the Appendix at Page 10a and is reported at 11 FEP Cases 1441 (DC Ariz. 1976).

JURISDICTION

The Court of Appeals entered its opinion and judgment on September 7, 1978. This Petition for Certiorari is filed within ninety days of that date.

Jurisdiction to review the opinion and judgment in question by Writ of Certiorari is conferred on this Court by 28 U.S.C. § 1254(1):

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

THE QUESTION PRESENTED FOR REVIEW

Does the duty of accommodation under the Civil Rights Act of 1964 require an employer and union to give preferential treatment to religious objectors to union security agreements by granting them complete exemption from the requirement of the collective bargaining agreement that all employees pay their fair

share of the collective bargaining costs in the form of monthly union dues and assessments.

THE STATUTES INVOLVED

The provisions of the federal statutes involved are lengthy and, therefore, are fully set forth in the Appendix. Pertinent portions of the statutes with their citations are set forth here.

The union security provisions of the Railway Labor Act provide, in pertinent part:

> "Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, . . . any carrier . . . and a labor organization . . . authorized to represent employees . . . shall be permitted . . . to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, . . . all employees shall become members of the labor organization representing their craft or class: . . ." 45 U.S.C. § 152, *Eleventh*.

The Civil Rights Act of 1964 provides in pertinent part as follows:

> "It shall be an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual's . . . religion . . . ." 42 U.S.C. § 2000e-2(a)(1).
>
> It shall be an unlawful employment practice for a labor organization . . . to cause or attempt to cause an employer to discriminate against an individual . . . ." 42 U.S.C. § 2000e-2(c)(3).
>
> For purposes of this title . . . [t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably ac-

commodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business. . . ." 42 U.S.C. § 2000e(j).

STATEMENT OF THE CASE

Respondent Burns is a brakeman-conductor for the Southern Pacific Transportation Company (hereinafter "Southern Pacific"). The collective bargaining representative for brakemen and conductors on the Southern Pacific is the United Transportation Union and its Local 807 (hereinafter "UTU"). In 1955, prior to Burns' employment and pursuant to Section 2, *Eleventh* of the Railway Labor Act, Petitioners Southern Pacific and UTU executed a collective bargaining agreement which required all future employees to become members of the UTU and thereafter maintain such membership in good standing. When Respondent Burns was employed by the Southern Pacific, he complied with the union security agreement, became a member of UTU and maintained his membership in good standing until 1974. That year he notified Southern Pacific and UTU that he was resigning his membership in the organization because of his religious belief in the doctrine of the Seventh Day Adventist Church that to belong or in any way financially support a labor organization was wrong. When the Union advised Burns that it would invoke the discharge provisions of the union security agreement if he did not continue to pay his monthly dues and assessments, Burns employed counsel with the assistance of the Seventh Day Adventist Church.

Burns' counsel met with the Union and took the nonnegotiable position that Burns would give absolutely no financial support to any collective bargaining agent.

This intractability foreclosed any discussion of other avenues of accommodation such as diversion of Burns' dues from the strike fund, etc. The Union did agree that Burns could terminate his membership in the organization and forego participation in any union activity but it was not willing to accede to Burns' unconditional demand that he be permitted to withdraw all financial support. Burns offered to contribute an amount equal to Union dues and assessments to a nonunion charity. This was unacceptable to the UTU because failure of Burns and others of similar belief to pay their fair share of the collective bargaining costs violated the collective bargaining agreement, shifted the burden of those costs to their fellow employees and constituted preferential treatment on the basis of their religion.

With the battle lines thus drawn, Burns filed a timely complaint with the Equal Employment Opportunity Commission charging that the Union's invocation of the discharge provisions of the union security agreement constituted discrimination against him on the basis of his religion. The Commission issued Burns a right to sue letter on February 20, 1974, and this suit was filed on March 1, 1974, alleging that to require Burns to pay periodic Union dues and assessments was religious discrimination in violation of the Civil Rights Act of 1964. 42 U.S.C. § 2000e et seq. The complaint sought injunctive relief prohibiting Burns' discharge, compensatory damages and attorneys fees. The parties agreed, however, that Burns could continue in his employment pending final disposition of this case and the claim for compensatory damages was dismissed.

In addition to the above, the District Court made the following findings of fact:

(1) Respondent Burns was sincere in his belief that he should not be a member of or financially support a labor organization; (2) The collective bargaining efforts of the UTU resulted in substantial employment benefits to Burns; (3) The representative efforts of the UTU within the framework of the Railway Labor Act contributed substantially to the fulfillment of the primary objective of that legislation, i.e., to promote industrial peace and to secure the uninterrupted flow of interstate commerce; (4) To fulfill its function, it was necessary that the Union expend large sums of money to pay the salaries and expenses of and to train, support and maintain the necessary complement of full and part-time union representatives and their supporting staffs, together with buildings, equipment and supplies for their use; and (5) In order to obtain the funds to perform its legislative duty, it is necessary for the union to collect from the employees an amount equal to their fair share of the collective bargaining expense.

The District Court further found that disproportionately high numbers of Seventh Day Adventists enter employment areas which provide union-free employment. If union security agreements are not enforced against Seventh Day Adventists, the railroad industry would provide an attractive employment opportunity for them because of its relatively high wages and the recent formidable growth of unions in fields that have in the past been union-free. If the plaintiff's position was sustained in this case, the Court said, it was likely that additional Seventh Day Adventists and other employees in the railroad industry with similar beliefs would refuse to pay dues and assessments to the union.

This, the Court found, would result in substantial hardship to the union.

With respect to plaintiff's offer to contribute the equivalent of UTU dues and assessments to a designated charity, the Court found that to be able to assure employees paying union dues that employees in Burns' situations were making a true contribution more would be required than the production of receipts for charitable donations. Investigation would be necessary to determine for each non-dues-paying employee the amount of his charitable contribution in the years immediately prior to discontinuing the payment of union dues and, in addition, investigation to be certain that the annual charitable contributions after discontinuing payment of union dues equal the total of his annual charitable contributions and dues and assessments before discontinuing payment. This investigation would require considerable time, effort and expense and would impose undue hardship on Southern Pacific and UTU.

The District Court also found that the employee hostility, dissention, friction and consequent loss of operating efficiency and safety which would result if plaintiff were to receive the benefits of collective bargaining without paying his fair share of costs would undoubtedly result in undue hardship on Southern Pacific. The operation of railroad trains, involving as it does assembling, switching and moving at high speeds large consists of railroad cars requires a team effort if it is to be efficient and safe. The testimony of both management and union witnesses, based on many years of experience, established a history of hostility and friction in the industry which is generated by the "no bill" or "free rider". This has a substantial adverse impact on safety and efficiency. The Vice President of Opera-

tions for Southern Pacific testified based on 39 years' experience that the failure to require Burns to pay his fair share of the collective bargaining costs would cause significant employee hostility, dissention and lack of communication. This would result in undue hardship to Southern Pacific in the form of reduced operational efficiency and safety. This opinion, the District Court said, appeared quite sound when consideration is given to the fact that Burns' fellow workers could very well be expected to have difficulty in accepting Burns' sincerity in being unable in conscience to pay union dues and assessments while he was able to accept the benefits he shares with fellow workmen made possible by their payment of dues.

Based on the testimony of a UTU Vice President with more than 30 years' experience in the industry, the Court found that the free-rider problems were serious enough on occasions to cause brother to be pitted against brother and father against son. Employee reactions to free riders in the past have included refusal of union members to speak to non-union members, union members bidding off assignments to avoid working with non-members and other conduct resulting in efficiency of operations. Specifically, the Court determined that employee reaction to Burns' failure to pay union dues and assessments was beligerence, hostility, threats of refusal to work with him and threats of refusal to pay dues to the Union if Burns is not required to do so. This was true even though these employees had been advised that Burns would make an equivalent charitable contribution.

On the basis of these findings, the District Court concluded that a reasonable accommodation had been offered to plaintiff and to accede to his demands of

complete financial severance from the Union would constitute an undue hardship on both Southern Pacific and UTU. A judgment in favor of Southern Pacific and UTU was entered and Burns appealed.

The Court of Appeals reversed. It held that the refusal of Southern Pacific and UTU to agree to some form of complete exemption from Burns' obligation under the collective bargaining agreement to pay union dues and accept in lieu thereof contributions of a like sum to charity was a violation of Title VII. The Court further concluded that the loss of Burns' dues, the administrative problems in policing "charitable substitutions" and the history of difficulty in the industry created by "free riders" were de minimis. Therefore, the Court said, the Company and Union failed in their burden to establish undue hardship.

REASONS FOR ALLOWANCE OF THE WRIT

The Court of Appeals held that no undue hardship is placed on an employer and union when they are required to violate their collective bargaining agreement in order to give preferential treatment to religious objectors to union security agreements by exempting them from the obligation to pay union dues. In so doing, the Court of Appeals has decided an important question of federal law in a way which conflicts with this Court's opinion in *Trans World Air Lines, Inc.* v. *Hardison,* 432 U.S. 63 (1977). Alternatively, if this question was not decided in *Hardison, supra.*, then the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

In *Hardison, supra.*, the Court of Appeals had found that the employee, who objected to Saturday work for

religious reasons, should have been accommodated by arranging a swap between him and another employee for Saturday shifts even though this would have violated the seniority provisions of the collective bargaining agreement. Reversing the Court of Appeals, this Court held that the duty of accommodation under Title VII of the Civil Rights Act did not require the employer to violate an otherwise valid collective bargaining agreement. Speaking for the majority, Mr. Justice White said:

> "[W]e do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid collective bargaining agreement. Collective bargaining, aimed at effecting workable and enforceable arrangements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed upon senority system must give way when necessary to accommodate religious observances . . . Id. at 79.
>
> Had TWA nevertheless circumvented the seniority system by relieving Hardison of Saturday work and ordering a senior employee to replace him, it would have denied the latter his shift preference so that Hardison could be given his. The senior employee would also have been deprived of his contractual rights under the collective bargaining agreement. Id. at 80.
>
> Title VII does not contemplate such unequal treatment . . . [S]uch discrimination is proscribed when it is directed against majorities as well as minorities. Id. at 81.
>
> [A]bsent a discriminatory purpose, the operation of a senority system cannot be an unlawful employment practice even if the system has some discriminatory consequences. Id. at 82."

If Burns and others with similar beliefs are not required to pay their fair share of the cost of collective bargaining to the union, the burden of that expense is shifted to their fellow employees even though the benefits resulting from such bargaining continue to flow to all. Thus here, as in *Hardison,* the "accommodation" demanded by Burns can only be granted at the expense of other employees and, of necessity, constitutes preferential treatment on the basis of religion to the detriment of other employees.

There is no valid basis for distinguishing between the seniority provisions of the collective bargaining agreement in *Hardison* and the union security provisions of the collective bargaining agreement in the instant case. The union security agreement has the imprimatur of congressional approval under Section 2, *Eleventh* of the Railway Labor Act as do *bona fide* seniority systems under Section 703(h) of the Civil Rights Act of 1964. 45 U.S.C. § 152, *Eleventh;* 42 U.S.C. § 2000e-2(h). Just as this Court recognized in *Hardison* that collective bargaining agreements with their seniority provisions lie "at the core of our national labor policy", it recognized in *Railway Employees* v. *Hanson,* 351 U.S. 225 (1955), that the union security provisions of the Railway Labor Act play an integral role in the stabilization of labor relations and achievement of industrial peace in the railroad industry:

> "Industrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained. The choice by Congress of the union shop as a stabilizing force seems to us to be an allowable one . . . ." Id. at 233.

Concurring, Justice Frankfurter found that the union shop provisions of Section 2, *Eleventh* were an "exercise by Congress of its power under the commerce clause to promote peaceful industrial relations in the functioning of interstate railroads and thereby to further the national well-being." 351 U.S. at 238, 239.

To hold, as did the Court of Appeals that shifting the religious objectors' fair share of the substantial costs of collective bargaining to their fellow employees is a de minimis burden for employer and union is to ignore what this Court found to be a problem in the railroad industry of such significance that it required congressional action to achieve its solution. In *Machinists Union* v. *Street,* 367 U.S. 740 (1961), the Supreme Court determined that the problems engendered by "free riders" who received the benefits of the union's collective bargaining, but refused to pay their fair share of its cost, were the catalyst to passage of the union shop provisions of the Railway Labor Act.[1] The

[1] An employee does not avoid "free rider" status by contributing an amount equivalent to his union dues to a non-union charity. The Congress and the Court define a "free rider" as one who fails pay his fair share of the collective bargaining costs. This is borne out by the testimony of Southern Pacific Vice President Ball in this case. When asked if charitable contributions would answer the "free rider" problem, he replied:

> "Well, I don't think you would get at the point that is involved by paying the money to a religious or charitable organization other than a union. The principle the reason he is paying his dues is to support the activities that the union discharges under the Railway Labor Act in representing all of their members, all of the people in their crafts, without distinction and without discrimination . . . I think the employees would feel that he was not supporting the legitimate activities of the union which he was enjoying the same as they were for the payment of monies they were making. I think they would consider that his contribution to an organization other than the one that was negotiating for his benefit was something they couldn't tolerate." (TR 312, 313, 314.)

Presidential Emergency Board referred to in the *Street* opinion reported:

> "Individuals who do not share with their fellow employees the cost of the union's activities, the benefits of which they are perfectly willing to accept, present a problem in equities which is very real. They incur the displeasure and resentment of those who are members, and this may cause frictions and feuds which will lead to disunity in the normal causes of the employees, a result definitely not keeping with the purposes of the Railway Labor Act." *Report of Presidential Emergency Board No. 98,* App't'd. Exec. Order 10306, N.M.B. Case No. A3744 (1951).

In *Railway Employees'* v. *Hanson,* 351 U.S. 225 (1955), the Supreme Court recounted the following relevant legislative history leading to passage of Section 2, *Eleventh*:

> "The union shop provision of the Railway Labor Act was written into the law in 1951. Prior to that date the Railway Labor Act prohibited union shop agreements . . . While non-union members got the benefits of the collective bargaining of the unions, they bore 'no share of the cost of obtaining such benefits.' As Senator Hill, who managed the bill on the floor of the Senate, said, 'The question in this instance is whether those who enjoy the fruits and the benefits of the unions should make a fair contribution to the support of the unions.' Id. at 231."

To ignore the reality of the substantial adverse impact on industrial peace and efficiency which would re-

sult if the opinion of the Court of Appeals is allowed to stand is to reject the validity of Congressional purpose in enacting Section 2, *Eleventh* and the recognition of that purpose in the decisions of this Court in enforcing it. Both make crystal clear that the central reason for the union security provisions of the Railway Labor Act was to secure industrial peace and eliminate disruptions to interstate commerce. To contend that a problem which required action on the part of the Congress to achieve its solution will not impose an undue hardship on the industry by its resurrection is specious. This case comes to this Court with more than two decades of congressional and judicial experience in the railway union security field. That experience dictates even-handed distribution of the financial burden of collective bargaining without preference on the basis of religion to the detriment of others.

To pretend, as did the Court of Appeals, that the dues of only one employee involved is sophistry. The undisputed evidence in the District Court was that one per cent of the members of Burns' Local are Seventh Day Adventists, one of the churches espousing the doctrine ascribed to by Burns. The Church is world-wide in scope with more than one-half million members in the United States. Primarily based on the testimony of a high official of the Church, the District Court found that disproportionately high numbers of Seventh Day Adventists enter employment areas which provide union-free employment. If the union security agreements in the railroad industry were not enforced against them, this industry would provide an attractive employment opportunity for members of that faith because of its comparatively high wages and the formidable growth of unions in fields that in the past have

been union-free. Indeed, the majority of this Court in *Trans World Air Lines, Inc.* v. *Hardison,* 432 U.S. 63 (1977), rejected a similar "one individual-de minimis" argument stating that "it fails to take account of the likelihood that a company as large as TWA may have many employees whose religious observances, like Hardison's, prohibit them from working Saturdays or Sundays." Id. at 84, fn. 15. In addition to the evidence in this case, one need only look to some of the litigation engendered by religious objectors to union security agreements to realize we are not dealing with trifles.[2] See, e.g., *Anderson* v. *General Dynamics,* Case No. 77-2180 (9th Cir. 1978), Appendix p. 21a; *McDaniel* v. *Essex International,* 571 F.2d 338 (6th Cir. 1978); *Cooper* v. *General Dynamics,* 533 F.2d 163 (5th Cir. 1976), cert. denied, sub. nom.; *International Association of Machinists & Aerospace Workers* v. *Hopkins,* 433 U.S. 908, 53 L.Ed.2d 1091 (1977); *Yott* v. *North American Rockwell,* 501 F.2d 398 (9th Cir. 1974); *Hammond* v. *United Paper Workers,* 426 F.2d 174 (6th Cir. 1972); *Linscott* v. *Miller's Falls Co.,* 440 F.2d 14 (1st Cir. 1971), cert. denied, 404 U.S. 872 (1971); *Gray* v. *Gulf, M. & O. RR.,* 429 F.2d 1064 (5th Cir. 1970), cert. denied, 400 U.S. 1001 (1971); *Otten* v. *Baltimore & Ohio RR.,* 205 F.2d 58 (2nd Cir. 1956); *Wicks* v. *Southern Pacific Co.,* 231 F.2d 130 (9th Cir. 1956).

To shift a religious objector's fair share of the collective bargaining costs to his fellow employees and, at

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[2] "*De minimis* in the law has always been taken to mean trifles—matters of few dollars or less". *National Labor Relations Board* v. *Suburban Lumber Co.,* 121 F.2d 829, 832 (3rd Cir. 1941) cert. denied 314 U.S. 693 (1941). Burns' dues alone amounted to $19.00 per month or $228.00 per year. He has now worked for the railroad approximately 20 years and over that period of time would have paid union dues totaling over $2,500.00.

the same time, permit him to retain all the benefits that derive from that effort is to afford him preferential treatment on the basis of his religion and to thereby discriminate against those who will bear that burden. In *Trans World Air Lines, Inc.* v. *Hardison, supra,* this Court concluded its opinion stating:

> "As we have seen, the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment. In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employee in order to enable others to observe their sabbath. Id. at 85."

Certainly, there is nothing in the legislative history to intimate that the 1972 religion amendment to the Civil Rights Act [42 U.S.C. § 2000e(j)] would have the impact on union security agreements negotiated pursuant to Section 2, *Eleventh* of the Railway Labor Act which results from the decision of the Court of Appeals. 45 U.S.C. § 152, *Eleventh.* It is instructive to observe that at no point in the legislative consideration of this amendment is there any mention of accommodation of objection to union security agreements.[3] The entire

[3] Congress has repeatedly declined to enact exceptions to the union security provisions of the National Labor Relations Act. H. R. 11666, 89th Cong. 1st Sess. (1965), a bill to exempt persons with religious convictions from the union membership requirements of National Labor Relations Act died in Committee; S. 3203, 89th Cong., 2d Sess. (1966), a bill to protect persons conscientiously opposed to union membership was defeated; S. 3153, 89th Cong. 2d Sess. (1966), a bill making it unfair labor practice under National Labor Relations Act to require persons conscientiously opposed to union membership to join them was defeated; and S. 2108, a bill to make it an unfair labor practice for a labor organization to discriminate on account of race, color, religion or national origin died in Committee.

discussion centered on Saturday work. 118 *Congressional Record* pp. 705-731.

Even more significant, however, is the statement of Senator Randolph, the sponsor of the bill, now so often quoted and relied on by the Courts as a succinct expression of the Congressional intent. See, e.g., *Riley* v. *Bendix Corporation,* 464 F.2d 1113 (5th Cir. 1972); *Reid* v. *Memphis Publishing Company,* 468 F.2d 346 (6th Cir. 1972). In urging passage of the amendment, he said:

> "I think that in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in federal, state or local government." 118 *Congressional Record,* p. 705.

Randolph then stated that the amendment effectuated this intent. Thereafter, it was unanimously adopted by the Senate and the House.

It is clear that "the enactment of . . . [Section 2, *Eleventh*] . . . is the governmental action on which the Constitution operates though it takes a private agreement to invoke the federal sanction." *Railway Employees'* v. *Hanson,* 351 U.S. at 232. As the courts have recognized, in enacting the Religion Amendment, Congress intended to protect from interference in private employment only the same rights as the Constitution protects from interference by federal, state or local government. *Riley* v. *Bendix Corporation, supra; Reid* v. *Memphis Publishing Company, supra.* The Constitution does not protect religious objectors against governmental compulsion to comply with union security agreements negotiated pursuant to Section 2, *Eleventh* of the Railway Labor Act. *Machinists Union* v. *Street,* 367 U.S. 740 (1961); *Railway Employees'* v. *Hanson,*

351 U.S. 225 (1955); *Yott* v. *North American Rockwell*, 501 F.2d 398 (9th Cir. 1974); *Gray* v. *Gulf, M. & O. RR.*, 429 F.2d 1064 (5th Cir. 1970). cert. denied 400 U.S. 1001 (1971). Consequently, because the making of union shop agreements under Section 2, *Eleventh* is constitutionally permissible governmental action and because it was intended by Congress that the Civil Rights Act protect the individual from interference with his First Amendment rights by private employers *only* to the same degree and extent that those rights are protected under the Constitution from interference by federal, state and local governments, there can be no violation of the Civil Rights Act in situations where, as here, the rights of religious objectors are not protected from governmental impingement by the Constitution.

Additional evidence that an exception to the union security provisions of the Railway Labor Act is not to be implied from the passage of the religion amendments to the Civil Rights Act can be found in the language of the statute itself.[4] It begins: "Notwithstanding any other provision . . . of any other statute or law of the United States . . ." A carrier and union may make

[4] *Cf. Morton* v. *Mancari*, 417 U.S. 535 (1974). In *Mancari*, this Court held that the Equal Employment Opportunity Act of 1972 had not impliedly repealed provisions of The Indian Reorganization Act of 1934 according to employment preference to Indians for jobs in the Bureau of Indian Affairs. Preference for Indians in the BIA was found to be a part of a longstanding national policy on Indians, just as the agency shop provision is a longstanding part of national labor policy. As stated by the Court: "In light of the factors indicating no repeal, we simply cannot conclude that Congress consciously abandoned its policy of furthering Indian self-government when it passed the 1972 amendments." Id. at 551.

union shop agreements. 45 U.S.C. § 152, *Eleventh*. This preamble indicates the strong policy in seeing that all who receive the benefits of union representation must bear a proportionate share of the cost, and that exceptions to this policy shall not be found unless clearly or expressly provided.

Indeed, in 1974 when Congress extended the coverage of the National Labor Relations Act to employees of non-profit hospitals, an express provision amending § 8(a)(3) was adopted to exempt "any employee of a health care institution who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body or sect which has historically held conscientious objection to joining or financially supporting labor organizations". 29 U.S.C. § 169 (1966 Supp.). Certainly, if the 1972 religion amendments to the Civil Rights Act already provided such an exemption, this legislation would have been totally unnecessary.

CONCLUSION

Contrary to the decision of the Court of Appeals, the decision of this Court in *Trans World Air Lines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), is clear that Title VII does not require violation of the union security clause of a valid collective bargaining agreement to accommodate the religious preference of employees where such violation would shift the financial burden of collective bargaining to other employees. If the decision of the Court of Appeals is not contrary to *Hardison*, then the Court of Appeals has decided an important question of federal law which has not been, but should be, decided by this Court. For the reasons set forth

herein, this Petition for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit is due to be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-1188

DUANE TERRELL BURNS, *Plaintiff-Appellant,*

v.

SOUTHERN PACIFIC TRANSPORTATION Co., et al.,
Defendants-Appellees.

Filed September 7, 1978

Appeal from the United States District Court
for the District of Arizona

Before: HUFSTEDLER and GOODWIN, Circuit Judges, and LUCAS,* District Judge

OPINION

HUFSTEDLER, Circuit Judge:

Burns brought this Title VII action seeking to enjoin his employer, Southern Pacific Transportation Company ("Company") and the United Transportation Union and its local ("Union") from discharging him for his refusal to pay union dues and assessments in violation of his sincerely-held religious beliefs. The district court held that the Union and the Company had fulfilled their statutory duties of accommodation required by the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*, particularly § 2000e(j) (1970 Supp. 2)) when they offered to relieve Burns of his obligation to belong to the Union and that no further accommodation was required because payment of the dues-equivalent to a charity worked an undue hard-

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* Honorable Malcolm M. Lucas, United States District Judge, Central District of California, sitting by designation.

ship upon the Union and its members by relieving Burns of paying his fair share of union expenses. The district court also rejected Burns' attack upon the constitutionality of the application to him of § 2, *Eleventh* of the Railway Labor Act (45 U.S.C. § 152, *Eleventh* (1970)). We reverse in part, holding that the Company and the Union failed to carry their burden of proving good faith efforts reasonably to accommodate Burns' religious beliefs and their further burden of proving that no accommodation reasonably could be made without undue hardship to the Union or the Company. We affirm the district court's rejection of Burns' constitutional claim.

Burns has been employed by the Company since 1955; he is classified as a brakeman and conductor. For many years he has also been a member of the Seventh Day Adventist Church. He withdrew from the Union on February 26, 1974, when he became aware that his affiliation with the Union and his payment of dues to the Union were in direct conflict with the teachings of his Church. The district court found on ample evidence that Burns has a sincere religious belief in the teachings of his Church forbidding membership in labor organizations and contributions to such organizations. He requested an informal accommodation to his religious beliefs and asked to meet personally with representatives of the Union and the Company. He has offered to pay the equivalent of union dues and assessments to a designated charity and to offer proof to the Union of such charity payments. The Union and the Company were willing to waive any requirement of membership in the Union and participation in union activites, but both declined to consider any accommodation which would involve Burns' not paying union dues and assessments.

Upon refusal by the Union and the Company to consider any accommodation in respect of dues and in anticipation of his discharge, Burns filed charges of religious discrimi-

nation with the Equal Employment Opportunity Commission in Arizona. Thereafter, he obtained a right-to-sue letter, and he filed this complaint in the district court on March 1, 1974. The original complaint sought injunctive relief, attorney's fees, and damages. After the Company and the Union agreed that Burns could continue to work while the litigation was pending, the complaint was amended to seek only injunctive relief from discharge and attorney's fees. The case was tried by the court without a jury, resulting in judgment against him, and Burns appeals.

At all material times the Company and the Union have had in effect a Union security agreement requiring all employees, as a condition of employment, to be members in good standing of the Union. A companion agreement between the predecessor of the Union and the Company contained a provision which gives some relief to religious objectors by stating that an employee having religious scruples against joining a union "will . . . be deemed to have met the requirements of the Union Shop Agreement if he agrees to and does pay initiation fees, periodic dues and assessments of the organization representing his craft or class signatory hereto."

Burns fully met his burden of proving a *prima facie* case of religious discrimination in violation of Title VII. He proved that he had a bona fide belief that union membership and the payment of union dues were contrary to the teachings of his Church. He informed his employer and the Union about his religious views. He was thereafter threatened with discharge for his refusal to pay union dues and assessments. (*Anderson v. General Dynamics Convair Aerospace Division* (9th Cir. 1978) —— F.2d ——.) Thereafter the burden was on the Company and the Union to prove that they made good faith efforts to accommodate Burns' religious beliefs, that the efforts were unsuccessful, and that they were unable reasonably to accommodate those beliefs without undue hardship. (42 U.S.C. § 2000e(j);

Anderson v. General Dynamics Convair Aerospace Division, supra.)

We begin our analysis with *Trans World Airlines v. Hardison* (1977) 432 U.S. 63. The Court noted there that Congress did not define the degree of accommodation which is required of an employer under section 701(j) of the Civil Rights Act (432 U.S. at 73-76), but that the legislative history is at least clear that "Congress intended to require some form of accommodation" and to change prior case law which had condoned an employer who "had not made any effort whatsoever to accommodate the employee's religious needs." (*Id.* at 74, n.9.) Thus, the employer is required to take some steps in negotiating with the employee to reach a reasonable accommodation to the particular religious beliefs at issue. (*Anderson v. General Dynamics Convair Aerospace Division, supra,* —— F.2d at ——; *McDaniel v. Essex International, Inc.* (6th Cir. 1978) 571 F.2d 338, 341-42.)

Once the employer has made more than a negligible effort to accommodate the employee (*Trans World Airlines v. Hardison, supra,* 432 U.S. at 77) and that effort is viewed by the worker as inadequate, the question becomes whether the further accommodation requested would constitute "undue hardship." Once again, this term is not defined by the Civil Rights Act, but the burden of proving undue hardship rests upon the employer or union. The *Hardison* Court found that the employer had demonstrated undue hardship where the accommodation requested by the employee (a four-day work week) would have effectively required preferential treatment on the basis of religion for Sabbatarians, causing sacrifices or dislocation in the work schedules of fellow-workers or requiring the employer to hire outsiders to work Saturday shifts at "premium wages." (*Id.* at 81-84.) The Court held that where the impacts upon co-workers or costs are greater than *de minimis,* undue hardship is demonstrated. (*Id.* at 84.) We now apply the *Hardison* principles to the facts herein.

The Company and the Union made no effort to accommodate Burns' particular religious beliefs. In effect, they informed Burns that his only alternative was to accept the terms of the existing contract which freed him from the obligation of membership if he paid dues to the Union. Burns' religious beliefs, however, forbade payment of dues to the Union. Neither the Company nor the Union attempted to accommodate this belief. Their position therefore is that no accommodation is possible when an employee refuses to pay the union dues and assessments because non-payment of such sums places an undue hardship on the Union as a matter of law or under proof offered in the case.

We rejected the contention that the substitution of payments to a charity for payment of union dues was an undue hardship as a matter of law in the companion case, *Anderson v. General Dynamics Convair Aerospace Division, supra.*[1] (*Accord McDaniel v. Essex International, Inc., supra,* 571 F.2d 338.) We therefore turn to the examination of the record to decide whether the Union and the Company proved as a matter of fact that substituted payments would create an undue hardship to the Union and the Company.

Appellees' hardship case was based in part upon opinions that "free rider" problems could cause serious dissention among employees, resulting in inefficiency of operation. These witnesses, however, did not attempt to relate a general sentiment against free riders either to Burns or to a person who, like Burns, made payments equivalent to union dues to a charitable organization. The Union and

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[1] No difference in result can be based upon the fact that the Union security agreement considered in *Anderson* responded to § 8(a)(3), (b)(2) of the Taft-Hartley Act, 29 U.S.C. § 158(a)(3), (b)(2) (1970) and that the Union security provisions of this case were authorized under the similar provisions of Section 2, *Eleventh* of the Railway Labor Act, 45 U.S.C. § 152. (McDaniel v. Essex Internat'l, Inc. (6th Cir. 1978) 571 F.2d 338.)

the Company also argued that, based on unofficial and unscientific polls, employee dissatisfaction with persons who were free riders or who received different treatment of any kind was not hypothetical. We are not persuaded. We agree with the Sixth Circuit, speaking in *Draper v. U.S. Pipe & Foundry Co.* (6th Cir. 1976) 527 F.2d 515, 520:

> "We are somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that has never been put into practice. The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted."

As we noted in *Anderson v. General Dynamics Convair Aerospace Division, supra,* undue hardship requires more than proof of some fellow-worker's grumbling or unhappiness with a particular accommodation to a religious belief. (—— F.2d at ——.) An employer or union would have to show, as in *Hardison,* actual imposition on co-workers or disruption of the work routine.

The Union also contends that it would suffer substantial financial hardship if Burns were permitted to pay the equivalent of union dues and assessments to a charitable fund because the costs of collective bargaining would be disproportionately borne by union members and because the administrative costs in keeping track of Burns' charitable contributions would be more than *de minimis.* Excusing Burns from paying his dues to the Union would deprive the Union of $19 per month. The allocation of dues payments was: $7 to the Local, distributed half for salaries and expenses and the other half to the Local's Committee of Adjustment; $5 to the International Union; $4 to the Union's General Committee of Adjustment; and $3 to the State Legislative Board. There was testimony from one of the Union officers that the loss of Burns' $19 per month

dues "wouldn't affect us at all." In our view, the loss of dues to the Union is *de minimis,* even if so necessary to its fiscal well-being that its equivalent would be collected from the Local's 300 members at a rate of 2 cents each per month. The district court did not decide to the contrary as in *Hardison.* (*See* 432 U.S. at 84, n.15.) Rather, the district court accepted the Union's contention that accommodating Burns would open the gate to excusing vast numbers of persons who claimed to share Burn's beliefs, hence resulting in a greater than *de minimis* burden on the Union and Union members. The record does not support this speculation. The evidence was that only three persons subject to the Local's jurisdiction were Seventh Day Adventists.[2] If, in the future, the expressed fear of widespread refusal to pay union dues on religious grounds should become a reality, undue hardship could be proved.[3] But on the present record, no substance was given to these apprehensions. (*See McDaniel v. Essex International, Inc., supra,* 571 F.2d at 343-44.)

We quickly dismiss the contention that administrative difficulties in accommodating Burns' religious beliefs would

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[2] The concern that quantities of religious objectors would deplete the financial resources of the Union is not shared by George Meany, President of the AFL-CIO. A letter from George Meany was introduced into evidence in which Mr. Meany expressed his opinion that religious views such as those of Burns should be accommodated to respect individual religious reservations in the administration of union security agreements and suggesting that an appropriate method for accommodation would be the payment of the equivalent of dues to a union charitable fund or to an agreed-upon charity.

[3] *See* Trans World Airlines v. Hardison, *supra,* 432 U.S. at 31 (it would be anamolous to conclude that reasonable accommodation requires actions depriving other employees of their rights); *see also id.* at 90 (Marshall, J., dissenting) ("important constitutional questions would be posed by interpreting the law to compel employers (or fellow-employees) to incur substantial costs to aid the religious observor.").

cause undue hardship. No evidence was presented on this point, other than testimony that keeping track of Burns' charitable contributions would entail some bookkeeping. No one testified concerning the cost of the minor modifications which would be thereby required, and we cannot say that the modest amount of paper work would impose even *de minimis* cost.

The district court correctly rejected Burns' constitutional challenge to section 2, *Eleventh* of the Railway Labor Act. As Burns necessarily concedes, the constitutional issue has been repeatedly resolved against him. (*E.g., Yott v. North American Rockwell Corp.* (9th Cir. 1974) 501 F.2d 398, 403-04.)

For the first time on appeal, the Company has challenged the constitutionality of § 701(j) of the Civil Rights Act, as amended, on the ground that it violates the establishment clause of the First Amendment. We decline to reach the constitutional question under these circumstances. If the Company is so inclined, it can raise the constitutional question in the district court following remand.

Burns is entitled to a reasonable attorney's fee as a part of his costs, pursuant to 42 U.S.C. § 2000e-5(k), the amount of which shall be fixed by the district court on remand.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with the views herein expressed.

Filed
September 7, 1978

Emil E. Melfi
Clerk, U.S. Court of Appeals

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOTICE OF ENTRY OF JUDGMENT

Please take notice that the judgment was filed and entered in the case noted on the attached disposition (opinion, memorandum or order). Also, please take special notice of the date of filing as it represents the date of entry judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 74-35 Tuc. (JAW)

DUANE TERRELL BURNS, *Plaintiff*,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, UNITED TRANSPORTATION UNION, AND UNITED TRANSPORTATION UNION LOCAL NO. 807, *Defendants*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having been heretofore tried to the court, sitting without a jury, and the court having heard and considered the evidence and considered the stipulations of the parties, the court now finds the facts and states separately its conclusions of law as follows:

Findings of Fact

1. Plaintiff, Duane Terrell Burns, a railroad trainman and a resident of Tucson, Arizona, has been employed by defendant Southern Pacific Transportation Company (hereinafter "Southern Pacific") in the capacities of brakeman or conductor since 1955. (R.T. 131).

2. Defendant United Transportation Union (hereinafter "UTU") is a labor organization national in scope which is certified to represent for collective bargaining purposes on Southern Pacific, the crafts of brakemen and conductors in which plaintiff is employed. (Pretrial Order, p. 2).

3. Defendant Southern Pacific is a common carrier by railroad engaged in the transportation of freight in interstate commerce. (R.T. 285, 299).

4. Defendant United Transportation Union, Local 807 (hereinafter "Local 807") is responsible for supervising the application and administration in the operations of

Southern Pacific, in and extending from Tucson, of collective bargaining agreements negotiated by the parent organization, UTU, through its respective general committees. (R.T. 257).

5. Plaintiff is a "person" within the meaning of 42 U.S.C., § 2000e(a) and is an employee of Southern Pacific, an "employer" within the meaning of 42 U.S.C., § 2000e (b). UTU and Local 807 are "labor organizations" within the meaning of 42 U.S.C., § 2000e(d). Plaintiff is subject to membership in UTU and Local 807 by virtue of 45 U.S.C., §§ 151, et seq.

6. Prior to plaintiff's employment with Southern Pacific, the predecessor of UTU and Southern Pacific negotiated a Union Security Agreement which provides in pertinent part, as follows:

> "All employees . . . shall, as a condition of continued employment . . . within sixty days following the establishment of . . . seniority . . . become members of and thereafter maintain membership in good standing in, the organization* . . .". (Joint Exhibits 1 and 5).

7. A companion agreement between the predecessor of UTU and Southern Pacific, executed contemporaneously with the agreement quoted in Paragraph 6, supra, provided the following accommodation to religious objectors:

> "In the application of the Union Shop Agreement . . . any employee *in service on the date of this agreement* who is not a member of the union representing his craft or class . . . and [who] will make affidavit [that] he was a member of a bona fide religious group, on the date of this agreement, having scruples against joining a union will . . . be deemed to have met the requirements of the Union Shop Agreement if he

* Now UTU.

agrees to and does pay initiation fees, periodic dues and assessments of the organization* representing his craft or class signatory hereto." (Joint Exhibits 3 and 6. Emphasis added).

8. Plaintiff, on being employed by Southern Pacific, became an active member of the predecessor of UTU and its Local 807 and subsequently was elected to the office of Local Chairman. (R.T. pp. 135, 136).

9. On November 21, 1970, plaintiff joined the Seventh-day Adventist Church and on February 26, 1974, resigned his membership in UTU and in Local 807 and refused to again tender to the Union periodic dues and assessments as required by the Union Security Agreement. (R.T. 135, 136; PX 17 in Evidence).

10. Plaintiff's reason for his severance of all connections with the Union lies in his religious convictions against membership in unions and financial support thereof. (R.T. 138, 144). He contends that the Union Security Agreement violates his rights under the First, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States and constitutes religious discrimination in violation of the Civil Rights Act of 1964, as amended in 1972. 42 U.S.C., §§ 2000e(j) and 2000e-2(a)(1). (Plaintiff's Complaint).

11. Plaintiff filed charges of religious discrimination with the Equal Employment Opportunity Commission, at Phoenix, Arizona, on November 21, 1973, in compliance with Section 706(e) of the Equal Employment Opportunity Act of 1972. No conciliation having been effectuated and upon plaintiff's request, the Commission issued to plaintiff on January 25, 1974, its Notice of Right to Sue with respect to defendant Southern Pacific and defendant Local 807; and on February 20, 1974, the Commission issued its Notice of Right to Sue with respect to defendant UTU. Plaintiff filed this action on March 1, 1974. (Pretrial Order, p. 3).

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* Now UTU.

12. It is a basic tenet held and taught by the Seventh-day Adventist Church for many years that it is a violation of God's teaching for its members who have matured in their beliefs to either join or support a labor organization. Plaintiff sincerely holds the belief that he should not be a member or financially support a labor organization; and plaintiff sincerely holds the belief, further, that his payment of monies to UTU would be a violation of his religious convictions and would jeopardize his eternal salvation. (Plaintiff's Brief, File Document 39, pp. 4 through 10).

13. Both UTU and Southern Pacific have agreed to accommodate plaintiff's religious beliefs by waving any requirement of the Union Security Agreement that plaintiff be or remain a member of the Union or participate in any Union activity, if he will pay to the Union, through the medium of periodic dues and assessment, his fair share of the costs of collective bargaining. (R.T. 164, 165).

14. The collective bargaining efforts of UTU have resulted in substantial employment benefits to the plaintiff in the form of high wages, job protection, security and promotional opportunity, health care, safer working conditions, retirement pay, and other incidental employment benefits, all of which are available to every employee in crafts represented by UTU, regardless of race, religion, national origin or sex. (R.T., pp. 153-156, 218-229).

15. UTU, in addition to its responsibility under the Railway Labor Act for the negotiation of collective bargaining agreements, also has the duty to administer and enforce those agreements on a virtually continuous basis. (R.T. pp. 212-217, 230-237). In fullfillment of this function, elected officials of UTU and its locals represent employees who are disciplined or discharged in administrative hearings on the various railroad properties, before the National Railroad Adjustment Board and before various Public Law Boards created pursuant to the Railway Labor Act. (R.T. pp. 225, 230-233).

16. The representative efforts of UTU within the framework of the Railway Labor Act and its processes contribute substantially to the fulfillment of the primary objective of that legislation, i.e., to promote industrial peace and to secure the uninterrupted flow of interstate commerce. (R.T. pp. 213-217).

17. The representative efforts of UTU to achieve the aforementioned purposes of the Ralway Labor Act and to secure to the members of its represented crafts the substantial benefits which they now enjoy in wages, working conditions, job security, and health and retirement benefits requires the expenditure of large sums of money to pay the salaries and expenses of and to train, support and maintain the necessary complement of full and part-time union representatives and their supporting staffs. It is further necessary for the union to purchase or rent and maintain some office buildings, many offices, and much office equipment and supplies. (R.T. pp. 230-236, 239-241).

18. In order to obtain the necessary funds to fulfill its legislative purposes under the Railway Labor Act and to fully and fairly represent all employees which it is certified to represent, it is necessary to assess and collect from these employees an amount equal to their fair share of the collective bargaining expense. These assessments are made in the form of and are called periodic union dues and assessments. (R.T. pp. 241, 242).

19. The Seventh-day Adventist Church is worldwide in its scope, with approximately one-half million members in the United States. (A.T. p. 28). In Local 807, one percent of the members belong to the Seventh-day Adventist Church. (R.T. pp. 258, 276).

20. Witness Melvin Adams, a high official in and an ordained minister of the Seventh-day Adventist Church, testified as an expert in behalf of the plaintiff. His testimony established that disproportionately high numbers of

Seventh-day Adventists enter employment areas which provide union-free employment and that if union security agreements in the railroad industry were not enforced against Seventh-day Adventists, this industry would provide an attractive employment opportunity for the members of that faith, particularly in view of the formidable growth of unions in fields that have in the past been union-free. (R.T. pp. 66,69).

21. If plaintiff's contentions herein are sustained, it is very likely that addition Seventh-day Adventists and other employees in the railroad industry with similar beliefs [1] would, on the basis of the decision herein refuse to pay dues or assessments to the Union. Further, it is very likely that many other persons holding such beliefs would seek and obtain employment in the railroad industry because of the relatively high wages and other benefits enjoyed by railroad employees. These developments would result in substantial financial hardship to defendant UTU.

22. Plaintiff testified (R.T. pp. 150-152) that he stood ready, so long as he remained an employee of Southern Pacific, to pay monies equal to UTU dues and assessments (and in lieu of payment thereof), to a designated charity (non-religious and non-union affiliated); and to furnish to UTU proof of each and every payment so made.[2] However,

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[1] See: *Wicks v. Southern Pacific Company*, 231 F.2d 130, at p. 132, f.n. 2.

[2] Burns testified, also that to implement this offer he had established a Trust (PX 18 in evidence) and paid into it an amount equal to the amount of union dues and asessments he would have paid had he remained a member of UTU. However, examination of the Trust Agreement discloses that the Trustee is plaintiff's church; the Agreement requires (a) that the cash held in the Trust be invested to earn at least 5% per annum, (b) that the specified (5%) rate be paid to Burns annually, (c) that all earnings from the cash in excess of 5% shall be retained by the Trustee, (d) that in certain circumstances both principal and income of

if the accommodation suggested by plaintiff were to be really operable in cases of employees having a conscientious objection to joining or financially supporting labor organizations, in order to keep peace and harmony between union members and Southern Pacific undoubtedly more would be required than proof of payment of the charitable contributions. For example, in order that Southern Pacific, or UTU, for that matter, would be able to assure employees paying union dues and assessments that employees in Burns' situation were not "free riding", more would be required than having the receipts for charitable donations produced and examined. Investigation and checking would be required in order to determine for each employee in Burns' situation the amount of his charitable contributions in the years immediately prior to his discontinuing payment of union dues and assessments. In addition, Southern Pacific and UTU would have to do the investigation and checking necessary to be certain that the annual charitable contributions of each employee in Burns' situation, after discontinuing payment of union dues and assessments, equaled the total of his annual charitable contributions and union dues and assessments before discontinuing payment of such dues and assessments. This burden, and likely others not presently apparent, would be cast upon Southern Pacific or UTU, or both, would require considerable time, effort and expense, and would impose undue hardship on Southern Pacific and UTU.

23. The employee hostility, dissension, friction, and consequent loss of operating efficiency and safety which would result if plaintiff were to receive the benefits of collective bargaining without paying his fair share of its costs would undoubtedly result in undue hardship on Southern Pacific.

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the Trust may be used for support of plaintiff, and (e) that in the event of plaintiff's death the assets remaining in the Trust are to pass to plaintiff's designated heirs. In light of the terms and provisions of the Trust, it is evident that there is no certainty that any monies now in the Trust will ever pass to a non-religious charity.

(R.T. 289-291). The operation of railroad trains, involving as it does assembling, switching, and moving at high speeds large consists of railroad cars requires a team effort if it is to be efficient and safe. (R.T. 264-266). The testimony of both management and union witnesses, based on experience, established that the hostility generated by the "no bill" or 'free riders" has a substantially adverse impact on such safety and efficiency. Witness Carl Ball, Vice-President of Operations for Southern Pacific, testified from an experience of thirty-nine years in the field that, in his opinion, the failure to require plaintiff to pay his fair share of the collective bargaining costs would cause significant employee hostility, dissension, and lack of communication, resulting in undue hardship to Southern Pacific in the form of reduced operational efficiency and safety. (R.T. pp. 287, 200-292, 311-315). Mr. Balls' opinion appears quite sound when consideration is given to the fact that Burns fellow workers could very well be expected to have difficulty in accepting Burns' sincerity in being unable in conscience to pay union dues and assessments while he was able to accept the benefits he shares with his fellow workmen, made possible by their payment of union dues and assessments.

24. UTU Vice-President George Legge testified, based on more than thirty years experience in the railroad industry, that free-rider problems were serious enough on occasions to cause brother to be pitted against brother and father against son. He testified that employee reactions included refusal of union members to speak to non-union members, union members bidding off assignment to avoid working with non-members, and other conduct resulting in inefficiency of operations. (R.T. pp. 244, 245). Chairman Dan Johnson of Local 807 testified that employee reaction to plaintiff's failure to pay union dues and assessments [3] was

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[3] The employees consulted by Johnson were advised that Burns would pay to a charity of UTU's choice an amount equal to union dues and assessments.

belligerance, hostility, threats of refusal to work with plaintiff, and threats of refusal to pay dues to the Union if Burns is not required to do so. (R.T. pp. 264-266, 273, 274, 277-281).

Conclusions of Law

1. This Court has jurisdiction of this action and of parties thereto.

2. The requirement that plaintiff tender periodic union dues and assessments as required by the Union Security Agreement negotiated by the defendants United Transportation Union and Southern Pacific Transportation Company pursuant to the Congressional authorization in Section 2, *Eleventh* of the Railway Labor Act does not violate plaintiff's rights under the *First, Fifth, Ninth,* or *Fourteenth* Amendments to the Constitution of the United States. *Railway Employees v. Hanson,* 351 U.S. 225 (1955); *Machinists Union v. Street,* 367 U.S. 740 (1961); *Yott v. North American Rockwell,* 501 F.2d 398 (9 Cir. 1974); 45 U.S.C. § 152, *Eleventh.*

3. Neither the Civil Rights Act of 1964 nor the 1972 amendments thereto operated to repeal, in whole or in part, or to modify Section 2, *Eleventh* of the Railway Labor Act authorizing the Union Security Agreement in question. *Yott v. North American Rockwell,* 501 F.2d 398 (9 Cir. 1974).

4. In enacting the Railway Labor Act, Congress was motivated by these legislative findings: Collective bargaining is more costly to a railroad from a monetary standpoint than such bargaining when conducted in any other industry. The administrative machinery involved is more complete and more complex. The mediation, arbitration, and Presidential Emergency Board provisions of the Railway Labor Act, while greatly in the public interest, are very costly to the Union. The handling of disputes through the National Railroad Adjustment Board also requires expenses which

are not experienced by unions in other industries. *Machinists Union v. Street,* 367 U.S. 740, 761-762.

5. Congress enacted Section 2, *Eleventh* of the Railway Labor Act in response to the problems and unrest created by the employee who received the benefits of collective bargaining while failing to pay his fair share of the cost thereof. *Machinists Union v. Street,* 367 U.S. 740, 763 (1961).

6. The Union Shop provisions of the Railway Labor Act represent an exercise by Congress of its power under the commerce clause to promote peaceful industrial relations in the functioning of interstate railroads and thereby further the national well-being. *Railway Employees' v. Hanson,* 351 U.S. 225 (1955).

7. Defendants UTU and Southern Pacific have offered a reasonable accommodation to plaintiff's religious beliefs by agreeing to waive any requirement that he remain a member of the Union or participate in any union activities so long as he continues to tender periodic dues and assessments as required by the Union Security Agreement. *Cooper v. General Dynamics,* 378 F. Supp. 1258, 1262.

8. The granting to plaintiff of the relief he requests in this action would, in light of Findings 21, 22, 23, and 24, supra, constitute "undue hardship" on Southern Pacific and UTU.

9. Defendants are entitled to judgment herein that plaintiff take nothing by his complaint, that this action be dismissed, and that defendants have their costs herein.

Dated: January 8, 1976.

James A. Walsh

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 74-35 Tuc. (JAW)

JUDGMENT
DUANE TERRELL BURNS, *Plaintiff,*

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, UNITED TRANSPORTATION UNION, and UNITED TRANSPORTATION UNION LOCAL NO. 807. *Defendants.*

Filed January 8, 1978

This cause having been heretofore tried to the court, sitting without a jury, and the court having filed herein its Findings of Fact and Conclusions of Law,

IT IS ORDERED AND ADJUDGED that plaintiff take nothing by his complaint herein, that the action be dismissed on the merits, and that defendants have and recover of plaintiff their costs of suit.

DATED: January 8, 1976.

/s/ James A. Walsh

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

No. 77-2180

DAVID ANDERSON, *Plaintiff-Appellant,*

v.

GENERAL DYNAMICS CONVAIR AEROSPACE DIVISION, a corporation, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, SILVERGATE DISTRICT LODGE 50, *an association, Defendants-Appellees.*

Appeal from the United States District Court
for the Southern District of California

Before: HUFSTEDLER and GOODWIN, Circuit Judges, and LUCAS,* District Judge

OPINION

HUFSTEDLER, Circuit Judge:

Anderson, a former employee of General Dynamics Convair Aerospace Division ("General Dynamics") brought this Title VII action against General Dynamics and the International Association of Machinists and Aerospace Workers, AFL-CIO, Silvergate District Lodge 50 ("Union"), claiming that he had been discharged in violation of the religious discrimination provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a) and 42 U.S.C. § 2000e(j)). He sought reinstatement of employment and benefits, an injunction restraining the Union from discriminating against him, back pay and allowances, allowances, reasonable attorney's fees, costs and interest. The district court held that no accommodation to Anderson's religious beliefs was possible because his offer to con-

* Honorable Malcolm M. Lucas, United States District Judge, Central District of California, sitting by designation.

tribute the amount of Union dues to a charity of his choice, rather than to the Union or charities of the Union's choice, imposed an undue hardship on the Union. (*Anderson* v. *General Dynamics Convair Aerospace Division* (C.D. Cal. 1977) 430 F. Supp. 418.)

The critical issue on appeal is whether the Union carried its burden of proving that it could not reasonably accommodate Anderson's religious convictions without undue hardship on the Union. We conclude that it did not carry its burden of proof.

Anderson was first employed by General Dynamics on October 11, 1956. In 1959, he became a member of the Seventh Day Adventist Church. A tenet of the Church is that its members should not belong to or contribute to labor organizations. Anderson has at all material times held a sincere belief in that tenet. From 1959 until April 3, 1972, the collective bargaining agreement between General Dynamics and the Union did not require General Dynamics to employ only / / persons who were union members. On April 3, 1972, however, the Union and General Dynamics entered into a collective bargaining agreement, which contained the following provision:

> "Any employee on the Company's active payroll who is in the bargaining unit and is not a member of the Union on 3 April, 1972, shall, as a condition of continued employment in the bargaining unit, join the Union within ten (10) days after the thirtieth (30th) day following the effective date of this agreement, and shall maintain his membership as provided in Paragraph A above."

Anderson did not join the Union within the time limitation provided by the security clause of the bargaining agreement. On May 25, 1972, the Union notified Anderson of his delinquency under the agreement. On June 12, 1972, Anderson informed General Dynamics, which, in turn, informed the Union, that his religious beliefs prohibited him from joining the Union. Two days later, the Union requested that Anderson be discharged for failure to abide by the provisions of the security clause. On June 16, 1972, General Dynamics discharged Anderson from his employment for the sole reason that he refused to become a member of or contribute to the Union.

The parties stipulated that neither the Union nor General Dynamics offered Anderson any specific alternatives or accommodations with respect to joining the Union, and both the Union and General Dynamics told Anderson that he had to follow the collective bargaining and join the Union. The parties also stipulated that Anderson had made known to his fellow workers, including his shop committeemen, that he would not join the Union and that he would not contribute to the Union, unless he could insure that his contributions went to a recognized charity.

Anderson promptly filed a complaint with the Equal Employment Opportunity Commission, which deferred the matter to the California Fair Employment Practice Commission ("FEPC"). The FEPC referred the case back to the EEOC. After finding reasonable cause to believe that Anderson's discrimination charge was well-founded, the EEOC attempted conciliation. When conciliation failed, EEOC issued a right to sue letter on October 5, 1975. Anderson timely filed a complaint in the district court. The district court rendered judgment against him, and he appeals.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) provides in pertinent part as follows:

> "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of

such individual's race, color, religion, sex or national origin. . . . ."

Similar conduct by a labor organization is also proscribed by the Act. (42 U.S.C. § 2000e-2(c).)[1]

In 1972, Congress enacted 42 U.S.C. § 2000e(j), incorporating the substance of the 1967 EEOC guidelines (29 C.F.R. § 1605.1). The section provides:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

As the Supreme Court has explained, in *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 74: "The intent and effect of this definition was to make it an unlawful employment practice under § 703(a)(1) for an employer [and also for a union] not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees."

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[1] Section 2000e-2(c) provides as follows:

"It shall be an unlawful employment practice for a labor organization——

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

Neither Congress nor the EEOC has attempted to spell out any precise guidelines for determining when the "reasonable accommodations" requirement has been met, nor the kinds of circumstances under which a particular accommodation may cause hardship that is "undue." These decisions must be made in the particular factual context of each case because the decision ultimately turns on the reasonableness of the conduct of the parties under the circumstances of each case. (*Redmond v. GAF Corp.* (7th Cir. 1978) 574 F.2d 897, 902-03; *Williams v. Southern Union Gas Co.* (10th Cir. 1976) 529 F.2d 483, 489. *Cf. Trans World Airlines, Inc. v. Hardison, supra,* 432 U.S. at 74-75.)

We, as well as other courts, have recognized that there is both tension and conflict between the legitimate interests of the Union in preserving the benefits of union security agreements, which are valid under the National Labor Relations Act (29 U.S.C. § 158), and the accommodation requirements of Title VII (*e.g., Yott v. North American Rockwell Corporation* (9th Cir. 1974) 501 F.2d 398; *McDaniel v. Essex Intern'l, Inc.* (6th Cir. 1978) 571 F.2d 338; *Cooper v. General Dynamics, Convair Aerospace Division* (5th Cir. 1976) 533 F.2d 163, 166-69). The balance has been struck, however, in favor of the elimination of discrimination in employment practices and requiring accommodation of religious practices absent proof by the Union, the employer, or both, that reasonable accommodation cannot be made without an undue hardship to the Union or to the employer. (*Trans World Airlines, Inc. v. Hardison, supra,* 432 U.S. 63; *McDonald v. Santa Fe Trail Transportation Co.* (1976) 427 U.S. 273; *Franks v. Bowman Transportation Co.* (1976) 424 U.S. 747.)

To establish a prima facie case of discrimination under §§ 2000e-2(a)(1) and (j) Anderson had the burden of pleading and proving that (1) he had a bona fide belief that union membership and the payment of union dues are

contrary to his religious faith;[2] (2) he informed his employer and the Union about his religious views that were in conflict with the Union security agreement; and (3) he was discharged for his refusal to join the Union and to pay union dues. (*E.g., Yott v. North American Rockwell Corp., supra,* 501 F.2d 398; *Redmond v. GAF Corp., supra,* 574 F.2d at 901.)[3] Both by stipulations of fact and by evidence introduced at trial, Anderson established his prima facie case.

The burden was thereafter upon General Dynamics and the Union to prove that they made good faith efforts to accommodate Anderson's religious beliefs and, if those efforts were unsuccessful, to demonstrate that they were unable reasonably to accommodate his beliefs without undue hardship. *Id.* at 902.

Neither the Union nor General Dynamics did anything to accommodate Anderson's religious beliefs. They contend that their failure to take any steps to accommodate is ex-

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[2] We have no occasion in this case to determine the breadth of the "beliefs" or "practices" protected by section 2000e(j) or to grapple with bona fides of a particular employee's religious convictions. Both of these facts are conceded for the purpose of this case. We are aware, however, of the Supreme Court's admonition in Fowler v. Rhode Island (1953) 345 U.S. 67, 70 that "it is no business of courts to say . . . what is a religious practice or activity . . . ." *See also* Redmond v. GAP Corp., *supra,* 574 F.2d at 900.

[3] We agree with the Seventh Circuit that the employee who has provided his employer with sufficient information to put it on notice of his religious needs is not required, as part of his prima facie case, to show that he thereafter made some efforts either to compromise or accommodate his own religious beliefs before he can seek an accommodation from his employer. (Redmond v. GAF Corp., *supra,* 574 F.2d at 901-02 ("While we feel plaintiff should be free, even encouraged, to suggest to his employer possible ways of accommodating his religious needs, we see nothing in the statute to support the position that this is part of plaintiff's burden of proof." *Id.* at 901.)

cused because Anderson insisted on making an equivalent payment to a charity of his choice, rather than paying the equivalent fund to the Union for charitable purposes. They rely heavily upon the district court's finding that Anderson's refusal to pay his charitable contribution to the Union was based on his general distrust of unions, rather than on religious beliefs. Finally, they argue that Anderson's suggestion of accommodation would work undue hardship as a matter of law because Anderson would become a "free rider."

The burden was upon the appellees, not Anderson, to undertake initial steps toward accommodation. They cannot excuse their failure to accommodate by pointing to deficiencies, if any there were, in Anderson's suggested accommodation. Thus, Anderson's motivation in selecting his own charity is irrelevant. Moreover, the district court's finding is contrary to the parties' stipulation of fact that teachings of Anderson's Church forbade making contributions to unions.

Appellees are left with the argument that Anderson's refusal to pay either his union dues or the equivalent of union dues to the Union for a charity of the Union's choice would be an undue hardship as a matter of law because the means of accommodation would create "free riders." The district court accepted this argument; we do not. We follow the Sixth Circuit in *McDaniel v. Essex International, Inc., supra,* 571 F.2d 338, with which our case is almost identical.

McDaniel was a Seventh Day Adventist who had a bona fide religious belief that membership in the union and the payment of union dues was a violation of her religion. She requested her employer and the union to make an accommodation to her religious beliefs, and she suggested that she would be willing to contribute an amount equal to the union dues to a non-sectarian charity to be chosen by the union and her employer. Neither responded to her request,

and she was discharged for her failure to adhere to the requirements of the union security agreement. The district court granted summary judgment in favor of the union and the employer, accepting their contentions that the accommodation that the employee suggested would work an undue hardship on the union as a matter of law because non-payment of union dues adversely affected the "financial core" of the union and thus impaired its ability to fulfill its collective bargaining functions. The *McDaniel* court reversed. The court pointed out that the union security provisions of the Taft-Hartley Act (29 U.S.C. § 158(a)(3), (b)(2) (1970)) "do not relieve an employer or a union of the duty of attempting to make reasonable accommodation to the individual religious needs of employees. [citations omitted]. The burden is on Essex and IAM to make an effort at accommodation and, if unsuccessful, to demonstrate that they were unable to reasonably accommodate the plaintiff's religious beliefs without undue hardship. The district court found that it would work an undue hardship on IAM to forego the dues payment by the plaintiff. There is no factual basis in the record for this conclusion. In *Draper v. U.S. Pipe & Foundry Co., supra* [(6th Cir. 1976) 527 F.2d 515], this court expressed its skepticism concerning 'hypothetical hardships' based on assumptions about accommodations which have never been put into practice. 527 F.2d at 520." (*Id.* at 343.)

Here, as in *McDaniel*, neither the Union nor the employer offered any evidence to prove that union members thought that a person was a free rider if he paid the equivalent of union dues to a charity, nor was there any evidence offered to prove as a fact that the accommodation of Anderson would otherwise have been an unduly difficult problem for the Union. It relied simply upon general sentiment against free riders.

Undue hardship means something greater than hardship. Undue hardship cannot be proved by assumptions nor by

opinions based on hypothetical facts. Even proof that employees would grumble about a particular accommodation is not enough to establish undue hardship. As the Supreme Court pointed out in *Franks v. Bowman, supra*, 424 U.S. at 775, *quoting United States v. Bethlehem Steel Corp.* (2d Cir. 1971) 446 F.2d 652, 663: " 'If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.' "[4]

We conclude that the Union and General Dynamics failed to carry their burden of proof, and, accordingly, the judgment must be reversed.[5] We also conclude that Anderson is entitled to a reasonable attorney's fee as part of his costs, pursuant to 42 U.S.C. § 2000e-5(k), the amount of which shall be fixed by the district court on remand.

Reversed and remanded for further proceedings consistent with the views herein expressed.

Filed September 7, 1978

EMIL E. MELFI
Clerk U.S. Court of Appeals

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[4] Appellees can take no comfort from the observation in Yott v. North American Rockwell Corp., *supra*, 501 F.2d at 403: "If appellees are able to demonstrate that any suggested accommodation would impose undue hardship on the Union or the employer's business, then Yott's discrimination claim should fail." We reversed in *Yott* because the appellees had not demonstrated that the suggested accommodation would impose undue hardship, and, as we have explained, the appellees in this case have not done so either.

[5] The appellees attacked the constitutionality of the provisions of Title VII in issue in this case, and they renew that attack, at least obliquely, on appeal. The district court did not reach any constitutional issue, and under these circumstances we also decline to address any constitutional questions.

STATUTES

The Railway Labor Act

45 U.S.C. § 152, *Eleventh*

Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties), uniformly required as a condition of acquiring or retaining membership, Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, first (h) of this act [§ 153 of this title] defining the jurisdictional scope of the first division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: Provided, however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this act and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: Provided, further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs fourth and fifth of section 2 of this act [this section] in conflict herewith are to the extent of such conflict amended.

PERTINENT PROVISIONS OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

42 U.S.C. § 2000e et seq.

§ 2000e-2. Discrimination because of race, color, religion or national origin

(a) Employers. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency. It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization. It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

§ 2000e. Definitions

For the purpose of this title [42 USCS §§ 2000 et seq.]—

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.